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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Fresno Division

11 In Re

Case No. 10-64581-A-7

12 LOWELL DEAN WELDON,

Chapter Number: 7

13 Debtor.

Docket Control #HAR-2

14 Date: November 2, 2011
15 Time: 9:00 a.m.
Dept: A, Courtroom 11
16 Judge: Honorable Whitney Rimel

17
18 **MOTION FOR AUTHORITY TO SELL REAL PROPERTY OTHER THAN
IN THE ORDINARY COURSE OF BUSINESS FREE AND CLEAR OF LIENS;
POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

20 James E. Salven, the duly appointed qualified and acting Chapter 7 Trustee in the
21 above-entitled case ("Trustee") hereby moves the Court for an order authorizing the sale of real
22 property other than in the ordinary course of business free and clear of lien of Internal Revenue
23 Service, Franchise Tax Board, Fidelity National Title Insurance Company ("Fidelity") and
24 Berakhot Trust and alleges as follows.

25 1. Among the assets in the estate are three unimproved lots generally located
26 at 4120 East Calwa, Fresno, California ("Real Property") more particularly described as:

27 Lots 38, 39 and 40 in Block 9 of Calwa Township, in the City of Fresno, County
28 of Fresno, State of California, according to the map thereof recorded in Book 6
Page 42 of Records and Surveys, Fresno County Records; APN 487-124-01

1 2. The Trustee has received an offer to purchase the Real Property for the sum
2 of \$15,000.00 cash upon close of escrow from Rafael Abundiz Garcia or his nominee. The sale
3 was obtained through Century 21 C. Watson Real Estate, Inc. pursuant to a listing agreement
4 previously approved by this Court. The sale is subject to a 6% commission to be paid upon close
5 of escrow. A copy of the sales agreement is attached as Exhibit A to the Declaration of James
6 Salven filed concurrently with this motion. The Real Property is sold "as is, where is." The
7 Trustee requests that the property be offered for higher and better bid in open court. At the time
8 of the hearing, the Trustee will request that the minimum overbid be fixed at \$1,000.00 with each
9 succeeding bid in increments of at least \$100.00. Any overbid shall be subject to the same terms
10 and conditions as the offer presented by this motion. The fixing of the initial overbid, successive
11 raises and other terms are within the discretion of the court.

12 3. A copy of the preliminary title report is attached to the Declaration of
13 James Salven filed concurrently with this motion as Exhibit B. The property is encumbered by
14 real property taxes in the approximate amount of \$2,000.00 that will be paid from escrow. The
15 City of Fresno has abatement liens of \$649.04 and \$149.70 for the years 2007 and 2008 which
16 will also be paid from escrow. The Franchise Tax Board has recorded eight liens that total
17 \$41,399.00. The Franchise Tax Board has filed a claim in this case in the amount of \$24,090.00.
18 The total claim of the Franchise Tax Board is disputed and the Trustee requests that the sale be
19 free and clear of the lien of the Franchise Tax Board which lien will attach to the proceeds of sale.

20 4. The Internal Revenue Service has filed a series of liens with priorities
21 mixed in with the liens of the Franchise Tax Board. The total recorded Internal Revenue Service
22 claim is approximately \$110,000.00. The Internal Revenue Service has filed a claim in this case
23 for \$127,940.00. Prior to the filing of the case, the Internal Revenue Service seized and sold three
24 parcels of real property owned by Debtor on December 3, 2010. The Internal Revenue Service is
25 currently holding approximately \$120,000.00 from this sale. The Internal Revenue Service filed
26 a motion in the Eastern District Court of California to confirm the sale and distribute the proceeds
27 on March 28, 2011, Civil #1:08-CV-01643-LJO-SMS. The seizure and sale by the Internal
28 Revenue Service was in some cases subject to the lien of the Franchise Tax Board and the

1 abstract of judgment of Fidelity. The claims of the Franchise Tax Board and the Internal Revenue
2 Service in this case total approximately \$151,000.00. The Trustee is concurrently filing five
3 motions to confirm sales with sale proceeds that exceed the difference between the total claims
4 filed by the Internal Revenue Service and the Franchise tax board less the amounts being held by
5 the Internal Revenue Service. The Trustee requests that the sale be free and clear of the lien of
6 the Internal Revenue Service with the lien to attach to the proceeds.

7 5. Fidelity National Title recorded an abstract of judgment on January 17,
8 2008 in the amount of \$96,715.28. Fidelity conducted a sheriff sale in 2008 and the property was
9 sold on August 25, 2009. The current balance according to Fidelity is \$24,225.00. The lien of
10 Fidelity was junior to many of the liens of the Franchise Tax Board and junior to some claims of
11 the Internal Revenue Service. The abstract of judgment of Fidelity is attached to all six properties
12 subject to the five motions for authority to sell filed concurrently with this motion. The Trustee
13 requests that the sale be free and clear of the lien of Fidelity because of the dispute as to priority
14 with the taxing agencies and that the lien of fidelity attach to the proceeds of sale with like
15 priority that existed on the Real Property. The Trustee anticipates sufficient funds to pay Fidelity
16 and the taxing from the five escrows.

17 6. The above-captioned Chapter 7 case was filed on December 20, 2010. On
18 August 25, 2011, Debtor Lowell D. Weldon and his wife Bessie L. Weldon, who is not a debtor
19 in this case, recorded a short form deed of trust and assignment of rents in favor of Berakhot Trust
20 allegedly securing an obligation of \$3,000,000.00. A copy is attached to the Declaration of James
21 Salven as Exhibit C. This obligation was a post-petition transfer in violation of 11 U.S.C. §549
22 and is disputed by the Trustee. The Trustee is concurrently filing an adversary proceeding to
23 avoid the deed of trust, which is a disputed obligation. The Trustee requests that the lien of the
24 Berakhot Trust, if any, attach to the proceeds of sale.

25 7. The sale is in the best interest of the estate and its creditors.

26 **JURISDICTION**

27 28 The Court has jurisdiction over this matter pursuant to the general grant of
jurisdiction of 28 U.S.C. § 1334. The matter is a core proceeding as defined by 28 U.S.C.

1 §157(b)(2)(A),(M), (N) and (O). This motion is brought pursuant to 11 U.S.C. § 363(b) and B.R.
2 2002(a) and B.R. 6004. Any opposition to the motion is controlled by B.R. 9014. Service is
3 provided pursuant to L.B.R. 9014-1. By this motion, Debtor requests that the provisions of B.R.
4 6004(g) be waived so that the proposed sale is not subject to the ten-day delay.

5 The sale of the property free and clear of the liens of the Franchise Tax Board,
6 Internal Revenue Service, and Berakhot Trust are authorized by §363(f)(4) in that the amount and
7 priority and validity are in bona fide dispute. The sale free and clear of the lien of Fidelity is
8 authorized under §363(f)(3) because the sale proceeds of the five pending sales are adequate to
9 pay the obligation to Fidelity.

10 **WHEREFORE**, the Trustee prays that he be authorized to sell the above-
11 described Real Property other than in the ordinary course of business free and clear of liens upon
12 the terms and conditions set for the above, subject to higher and better bid in open court and for
13 such further and other relief as the Court deems proper.

14 Dated: October 11, 2011.

15 McCORMICK, BARSTOW, SHEPPARD
16 WAYTE & CARRUTH LLP

17 By: 
18 Hilton A. Ryder
19 Attorneys for James Salven
20 Chapter 7 Trustee

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